REMARKS

Entry of the foregoing amendments prior to consideration of the application on the merits is respectfully requested.

The Office Action Summary correctly indicates that claims 1-18 were pending in the application. Claims 1-18 are subject to a restriction requirement set forth in the Office Action.

Claims 1, 3 and 4 have been amended.

Support for the amendment to claim 1 can be found in the specification, at least at page 9, paragraphs 038 and 039.

Claims 3 and 4 are amended merely for uniformity in reciting "SEQ ID NO:."

Claims 15-18 have been canceled without prejudice or disclaimer of the subject matter described therein.

No prohibited new matter has been introduced by way of the above amendments. Applicants reserve the right to file a continuation or divisional application on subject matter canceled by way of this Amendment.

The Office Action sets forth a restriction requirement dividing the claims into 11 groups. Applicants hereby elect, with traverse, Group I, comprising claims 1-8 and 18, directed to promoter fragments comprising a nucleotide sequence of SEQ ID NO:2, including SEQ ID NO:1, and chimeric genes. It is understood that upon a finding that the elected materials claims are allowable, method claims 13-14, which incorporate all the features of the elected materials, can be rejoined.

The restriction requirement is respectfully traversed, because the requirement is contrary to the stated policy of the Office at least in significant part. Under the published policy of the Office, a ***required element*** for a restriction requirement to be proper is that if the

search and examination of an entire application can be made without ***serious burden***, the examiner must examine the entire application on the merits, even though it includes claims to independent and distinct inventions. M.P.E.P. § 803.

The reasons underlying this policy can be appreciated from the following. Restriction is a ***discretionary*** practice under published policies of the Office. If two or more independent and distinct inventions are claimed in one application, the Director ***may*** require the application to be restricted to one of the invention. 35 U.S.C. § 121 (emphasis added). The validity of a patent does not depend on whether one or more inventions are claimed therein. *Id.*

It is thus apparent that restriction practice must balance the burdens on the Examiner in examining a single application with the burdens on the Office, the public and the applicant in processing, prosecuting, searching, and analyzing multiple applications and the multiple patents that result from multiple divisional applications.

In view of the policy stated in M.P.E.P. § 803, at least the claims of Group IV, drawn to a plant cell, plant and seed comprising the chimeric gene of Group I should be rejoined with Group I and examined together. There can be no ***serious burden*** to examine these claims together, because searches for the relevant prior art would necessarily be substantially coextensive. Indeed, the complete distinguishing characterization of the plant cells, plants, and seeds is that the plant cells, plants, and seeds comprise the elected chimeric genes. Consequently, it is hard to conceive of any search strategies that would be mutually exclusive between these groups.

Accordingly, Applicants respectfully request the rejoinder of Group IV with elected Group I.

Further and favorable action in the form of a Notice of Allowance is believed to be next in order. Such action is earnestly solicited.

In the event that there are any questions relating to this application, it would be appreciated if the Examiner would telephone the undersigned concerning such questions so that prosecution of this application may be expedited.

The Director is hereby authorized to charge any appropriate fees that may be required by this paper, and to credit any overpayment, to Deposit Account No. 02-4800.

Respectfully submitted,

BUCHANAN INGERSOLL PC

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